Supreme Court of the United States

OCTOBER TERM, 1963

No. 389

DEPARTMENT OF REVENUE ----------PETITIONER

AGAINST

JAMES B. BEAM DISTILLING COMPANY --------RESPONDENT

On Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR PETITIONER, DEPARTMENT OF REVENUE

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CASES

CONSTITUTION, STATUTES & REGULATIONS

In the

Supreme Court of the United States

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No. 389

DEPARTMENT OF REVENUE ---------- *Petitioner*

v.

JAMES B. BEAM DISTILLING COMPANY ---------- *Respondent*

BRIEF FOR PETITIONER

May It Please The Court:

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky was delivered on March 1, 1963. (R. pp. 36-40). Petition for Rehearing was overruled by the Court on May 24, 1963. (R. p. 41). The opinion is reported as James B. Beam Distilling Company v. Department of Revenue, Ky., 367 S.W. 2d 267.

JURISDICTION

Jurisdiction is vested in this Court pursuant to the provisions of Title 28, U.S.C.A., Sec. 1257 (3). The opinion attacked here was delivered March 1, 1963 (R. pp. 36-40). Petitioner's petition for rehearing was overruled May 24, 1963 (R. p. 41). Petitioner filed its petition for writ of certiorari to the Court of Appeals of Kentucky with this Court on August 20, 1963. The writ was granted on October 14, 1963 (R. p. 42). 11 L. ed. 2d 48.

The decision of the Kentucky Court of Appeals has stricken down the taxing and police power of the Commonwealth of Kentucky with regard to intoxicating beverages brought within its territorial jurisdiction by the respondent. This result was reached upon the theory that as to whiskey imported from without the country, Article I, Section 10, Clause 2 of the United States Constitution, commonly called the Export-Import Clause, destroys the state's undoubted power to tax and regulate whiskey brought into its borders from sister states. Grave results to the domestic industry would be threatened if the opinion of the Court of Appeals of Kentucky were correct and, at the least, Kentucky's alcoholic beverage control and taxing statutes would have to be revised if the opinion below stands.

The importance of this question on the interplay of federal and state power with regard to alcoholic beverages provides the basis for the Court's grant of certiorari and compelling reasons exist for the reversal of the opinion of the Court of Appeals of Kentucky.

STATUTES AND REGULATIONS INVOLVED

Art. I, Sec. 10, Cl. 2, of the United States Constitution:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The Twenty-first Amendment, Constitution of the United States:

> "Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

27 U.S.C.A., Sec. 121:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C.A., Sec. 122:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

KRS 243.680 (1):

"No person shall manufacture distilled spirits in this state unless he first obtains from the department

a permit to engage in the business of manufacturing distilled spirits. At the time of the issuance of the permit he shall pay to the state a tax of ten cents for each proof gallon of distilled spirits for which the permit is issued.

KRS 243.680 (2):

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

KRS 243.990 (6):

"Any person who fails to pay the taxes imposed by KRS 243.680 to 243.700 within fifteen days after they have become due, shall pay a penalty of twenty percent on the amount of the tax due."

Regulation PN-13:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made.

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department

of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carrier's copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

QUESTION PRESENTED

The question presented for review may be stated quite simply as follows:

Where a state has imposed a license or occupational tax upon the business of distilling and manufacturing alcoholic beverages within the state, is it within the power of the state, consistent with Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place an equal and like tax on the business of bringing distilled spirits into the state from a foreign country to be processed for sale to consumers?

STATEMENT

Respondent, James B. Beam Distilling Company, hereinafter referred to as the taxpayer, is engaged in the business of manufacturing, warehousing, bottling, importing, and selling distilled spirits products. It owns and operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky. (R. p. 5)

During the year 1959, the taxpayer entered into an agreement with W. A. Gilbey Limited of London, England, under the terms of which the taxpayer was granted the right to buy from Gilbey for importation, sale, and distribution in the United States a Gilbey product known as "Gilbey's Spey Royal Scotch Whiskey." (R. p. 5)

Between the dates of September 1, 1959, and April 1, 1960, the taxpayer acting under its agreement with Gilbey purchased and imported from Scotland into the United States and the Commonwealth of Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch Whiskey. Some of the whiskey was in cases of twelve bottles each and some in the original casks. The bottled whiskey was ready for the consumer market. The whiskey casks had to be withdrawn from the bonded warehouse, the whiskey removed from the cask, reduced in proof to 86.8% by the addition of distilled water, and then bottled and cased. (R. pp. 17-21)

In accordance with the requirements of Kentucky Revised Statutes 243.680 (2), the taxpayer applied to and received from petitioner, Department of Revenue, hereinafter referred to as Department, permits authorizing the taxpayer to carry on its business by bringing into Kentucky from Scotland the quantity of Scotch whiskey shown on each permit. (R. pp. 9-16) The Department, at the time the permits were issued, collected from the taxpayer a license tax at the rate of ten cents per proof gallon for each proof gallon shown on the permit. Payment of

the tax at that time was discretionary as respondent could have deferred payment without penalty had it so elected. KRS 243.990 (6).

The Scotch whiskey was loaded on shipboard by the vendor at Glasgow, Scotland, and entered the United States at the ports of Chicago, Illinois, and New Orleans, Louisiana. The whiskey was then shipped by a common carrier to Louisville, Kentucky, where it was received by Robert Ice Truck Lines of Shepherdsville, Kentucky, and transported by truck belonging to said truck line from Louisville to Clermont, Kentucky, where it was received by the taxpayer into its Class 2 and 8 United States Customs Bonded warehouses. (R. p. 6)

The taxpayer filed a claim for refund of the tax, which claim the Department denied. The taxpayer then filed a Petition for Review before the Kentucky Tax Commission. (R. p. 4) By order No. 2,861 of the Commission, the Department's denial of the taxpayer's claim for refund was affirmed. (R. p. 26)

The taxpayer appealed to the Franklin Circuit Court. (R. p. 2) The case being submitted on the record made before the Kentucky Tax Commission, the Order of the Kentucky Tax Commission was upheld. The opinion and judgment of that Court correctly stated the law applicable to this controversy. (R. pp. 29-33). Taxpayer appealed the judgment of the Franklin Circuit Court to the Kentucky Court of Appeals. That Court delivered its opinion reversing the judgment of the Franklin Circuit Court. (R. pp. 36-40).

ARGUMENT

I. BROWN V. MARYLAND HAS NO APPLICATION TO THIS CASE.

The case of Brown v. Maryland, 25 U.S. 419, 6 L. ed 678 (1827), construed the Import-Export Clause of the Federal Con-

stitution as prohibiting the State of Maryland from imposing a direct tax on property imported into its boundaries. That case involved a tax on wines and distilled spirits, but the opinion dealt with imported properties generally. Since its enunciation, Brown v. Maryland, supra, has stood as the landmark opinion on all questions on the power of a state to tax articles imported from without the country.

That opinion has, however, never been asserted as prohibiting any tax other than a *direct tax* on property brought within the country.

This Court has said that the Import-Export Clause of the United States Constitution has no application to the process of importation after goods are unloaded at the water's edge. In Canton Railroad Co. v. Rogan, 340 U.S. 511, 95 L.ed 488 (1951), the State of Maryland imposed a franchise tax measured by gross receipts apportioned to the length of lines within the state. Canton Railroad Co. challenged the tax under the Import-Export Clause insofar as the gross income from which the tax was measured included revenues derived from the handling of goods moving in foreign trade. Canton was a common carrier of freight operating entirely within the city of Baltimore, Maryland. Its operating revenues were derived from switching freight cars from the piers to the lines of connecting railroads, from storage charges, and from wharfage fees for the privilege of using Canton's piers to transfer to lighters and trucks, the weighing of loaded freight cars, and furnishing of a crane for use in unloading vessels.

A substantial portion of the freight moving to and from the port consisted of exports from and imports into the United States. This Court, in holding that the inclusion of the railroad's receipts for services in handling imports and exports at its marine terminal did not violate the Import-Export Clause, stated that the tax was not on the articles of import and export.

This Court went on to say that the cases of A. G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 67 L.ed 865, 43 S.Ct. 485 (1923), and Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L.ed. 80, 67 S. Ct. 156, (1946), cited by Canton, relative to when the export process starts, had no application since the Maryland tax was not on the goods but on the *handling* of the *goods* at the port.

This Court made this very significant statement:

> "To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge. The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them. The phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports.
>
> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. Joseph v. Carter & Weekes Stevedoring Co. 330 US 422, 91 L ed 993, 67 S Ct 815.
>
> "We do conclude, however, that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."

In the companion case of Western Maryland Railway Company v. Rogan, 340 U.S. 520, 95 L. ed 501 (1951), this Court

expanded its analysis of the question in Canton Railroad Co. v. Rogan, supra, by saying:

> "What we have said in Canton R. Co. v. Rogan (US) supra, is dispositive of this case. The present facts illustrate how wide a zone of tax immunity would be created if the contrary holding were made in the Canton R. Co. case. There we were dealing with the handling of exports and imports within a port. Here we have transportation of exports and imports to and from the port. If Maryland were required to grant tax immunity to the services involved in getting the exports to the port and the imports to their destination, so would any other State. The ultimate impact of such a holding is difficult to measure, since manifold services are involved in the movement of exports and imports within the country. Problems of this nature, like many problems in the law, involve the drawing of lines. So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge. Whether loading and unloading would be exempt is a question we reserve."

As recently as October, 1963, this Court has indicated that it regards the question as settled by a refusal of certiorari, Southcoast Fisheries, Inc. v. Department of Fish & Game, 28 Cal. Rep. 537; Certiorari Denied, 11 L. ed 2d 122.

Prior to its decision in the instant case, the Kentucky Court of Appeals had consistently construed the provisions of KRS 243.680 (1), (2), as not being a tax directly upon the spirits but as being a license tax upon the business of manufacturing, distilling, and rectifying intoxicating beverages. In Brown-Forman Company v. Commonwealth, 125 Ky. 402, 101 S.W. 321 (1907), that Court said:

> ". . . The tax is not upon the spirits. It is a license tax upon the business. To hold it a tax upon the property,

we must disregard the word 'license' in both the title and the body of the act. . . ."

On appeal of that case, this Court approved such construction, Brown-Forman Company v. Commonwealth of Kentucky, 217 U.S. 563, 54 L.ed 883 (1910).

Not only has the Court of Appeals previously so construed the questioned taxing statute but in its opinion below its concluded that the tax was not upon the distilled spirits but upon ". . . the act of transporting or shipping the distilled spirits under consideration into this State. . . ."

The Court rested its opinion, in part, on the opinion of this Court in Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L.ed 89 (1946). In that case, a single isolated sale of oil to a foreign buyer was held to be exempt from a state sales tax as violative of the Import-Export Clause. The business of selling or producing oil was not being taxed. In the case at bar, the business of rectifying, distilling, blending, and selling intoxicating beverages is involved. The statute judged to be violative of the Import-Export Clause has been on the books of the statutory law of Kentucky for more than half a century. During that time, it has been approved as an excise tax on such business.

It is, therefore, submitted that Richfield Oil Corporation v. State Board of Equalization affords no basis for the opinion of the Court of Appeals of Kentucky. If, however, the opinion of Richfield Oil Corporation v. State Board of Equalization should appear to be dispositive of the issue, it is submitted that that opinion cannot be harmonized with the expressions of this Court in Canton Railroad Company v. Rogan, supra, and Western Maryland Railway Company v. Rogan, supra. If in conflict, the views in the two later cases stand on better reasoning and Richfield Oil Corporation v. State Board of Equalization should be expressly overruled.

Even if the taxes imposed by KRS 243.680 (1), (2), are regarded as taxes directly upon the spirits, the petitioner is empowered to levy the questioned taxes. Imported property loses its immunity from taxation when it is so used by its owner as to irrevocably commit it to a process of manufacture. The Scotch whiskey involved here was brought to the business premises of the respondent in Clermont, Kentucky, and stored in Customs Bonded warehouses where it was removed into the bottling house of respondent so that it could be reduced in proof by the addition of distilled water, bottled, labeled, and cased in conformity with applicable United States, Federal, and State laws and regulations. At this point, the whiskey was then ready for sale on order into the consumer market of the United States. (Affidavit of Mrs. Ruth B. Carey, R. p. 21, par. 14). Youngstown Sheet & Tube Company v. Bowers and United States Plywood Corporation v. City of Algoma, 358 U.S. 534, 79 S.Ct. 383, 3 L.ed. 2d 490 (1959).

II. ASSUMING ARGUENDO THAT THIS TAX IS A DIRECT TAX ON THE IMPORTATION OF DISTILLED SPIRITS INTO KENTUCKY, CONGRESS HAS GIVEN ITS CONSENT TO THE LEVYING OF SUCH A TAX.

As early as 1890, Congress gave consent to the states to the taxation of intoxicating liquors imported from foreign countries in the original package to the same extent as liquor produced in such states, 27 U.S.C.A. 121; 27 U.S.C.A. 122. These sections were passed under the authority of the Import-Export Clause which permits Congress to consent to the laying of imposts and duties on imports by the states. Thus, distilled spirits more than 73 years ago were declared by Congress to be a unique type of property and one which the states should have the authority to control.

So obvious is this fact, that this Court approved the state's right to impose conditions on the entry of distilled spirits from

foreign countries in a two-column memorandum opinion fifty years ago. DeBary & Co. v. State of Louisiana, 227 U.S. 108, 57 L. ed. 441 (1913).

III. THE TWENTY-FIRST AMENDMENT TO THE FEDERAL CONSTITUTION HAS DEFINITELY SETTLED THE QUESTION OF THE STATE'S RIGHT TO CONTROL THE IMPORTATION OF ALCOHOLIC BEVERAGES INTO AND THROUGH ITS BORDERS.

Acting in accordance with the principle that this Court will not pass on questions of constitutionality unless such action is unavoidable, this Court has never passed upon the grave constitutional issue of whether the broad sweep of powers accorded the states by the Twenty-first Amendment renders state laws taxing and regulating alcoholic beverages superior to conflicting federal laws. This Court has, however, while refusing to confront that issue, consistently stressed the broad state power with regard to intoxicating beverages. United States vs. Frankfort Distilleries, Inc. 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945); Nippert v. City of Richmond 327 U.S. 416, 66 S. Ct. 586, 90 L. ed. 760 (1946); Carter v. Virginia 321 U.S. 131, 64 S. Ct. 464, 88 L. ed. 605 (1944).

The reasoning of Justice Frankfurter in Carter v. Virginia, supra, is pertinent here. On pages 613 and 614 of 88 L. ed. it is said:

> ". . . The Twenty-first Amendment prohibits the 'transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. . . .

". . . In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

"6. It is now suggested that a State must keep within 'the limits of reasonable necessity' and that this Court must judge whether or not Virginia has adopted 'regulations reasonably necessary to enforce its local liquor laws.' Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

"7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of the liquor traffic. The issue was fairly presented in Mahoney v. Triner Corp., 304 US 401, 82 L. Ed. 1424, 58 S. Ct. 952. And this was the holding:

" 'We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so

would, as stated in the Young's Market Co.'s Case (299 US 59) p 62, 81 L. Ed. 38, 40, 57 S. Ct. 77, "involve not a construction of the Amendment, but a rewriting of it." 304 US 404, 82 L. Ed. 1427, 58 S. Ct. 952.

"Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the 'reasonableness' of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

". . . And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. . . ."

It is true the Carter case did not deal with distilled spirits imported from a foreign country, but in the case of Gordon v. Texas, 310 S.W. 2d 328 (1958), the court was confronted with the question of the power of Texas to tax the importation into Texas of rum from the Republic of Mexico which was not even sold or consumed in the State of Texas but merely transported to the owner's home in North Carolina.

The Texas Court had little difficulty in sustaining the power of the State to impose a nondiscriminatory tax on whiskey brought into its borders from a foreign country.

This Court affirmed that expression of opinion per curiam citing the case of Carter vs. Virginia, supra, and the Twenty-first Amendment. Gordon v. Texas, 355 U.S. 369, 2 L. ed. 2d 352, 78 S. Ct. 363 (1958).

The state's police power to control the movement of distilled spirits was restored under the Twenty-first Amendment as exemplified in the case of Ziffrin v. Reeves, 308 U.S. 132, 84 L. ed. 128, 60 S. Ct. 163 (1939). There the Court considered the entire matter of Kentucky's power over the shipment of distilled

spirits into its borders. The Commonwealth of Kentucky had provided that any distilled spirits entering the state that did not follow designated routes of entry and passage would be considered contraband. This Court is sustaining the power to so control such spirits, at page 135 of the Lawyers Edition:

> "... Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. ..."

The most recent expression of opinion defining a state's power with regard to intoxicating beverages brought within its territorial limits is that of American Travelers Club, Inc. v. Hostetter, etc., 219 F. Supp. 95 (1963) (U.S.D.C. S.D. New York). In that case a three judge court, speaking through Justice Medina, upheld the New York Alcoholic Beverage Control Law in its entirety as applied to alcoholic beverages brought into the State of New York by travelers returning from foreign countries. While not dealing expressly with the Export-Import Clause, Justice Medina concluded:

> "Whether one takes the position that the Twenty-first Amendment frees the states entirely from the ambit of the Commerce, Due Process and Equal Protection Clause, or whether one takes the view that reasonable regulation of liquor traffic by a state constitute a proper exercise of the police power, it is abundantly clear that New York has not violated any of the constitutional provisions relied upon by plaintiff. ..."

The Kentucky statutes impose a tax on the business of manufacturing distilled spirits within the state. Its power to do so is not challenged. Complementary to that lawful exercise of power it has imposed a like and equal tax upon whiskey brought into the state, KRS 243.680 (1) (2).

Under the Twenty-first Amendment, the state's power with regard to alcoholic beverages may be exercised without regard to the origin of intoxicating beverages introduced into its territorial limits. That being true, the opinion of the Court of Appeals of Kentucky must be reversed.

CONCLUSION

For the reason and on the authorities set forth herein, it is submitted that the opinion of the Court of Appeals of Kentucky is erroneous.

The opinion of the Court of Appeals of Kentucky should be reversed together with directions to it to reinstate the judgment of the Franklin Circuit Court denying respondent the relief sought and adjudging that respondent is not entitled to a refund of the taxes paid.

Respectfully submitted,
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